In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 576

CAPTAIN HOWARD BRETT LEVY, FOR HIMSELF AND FOR ALL OTHERS SIMILARLY SITUATED, PETITIONER

v.

HONORABLE HOWARD F. CORCORAN, UNITED STATES DISTRICT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a captain in the United States Army, seeks review in this Court of a decision of the court of appeals for the District of Columbia (Pet. App. 46–69) denying his application for a writ of mandamus directing respondent, a judge of the United States District Court for the District of Columbia, to convene a three-judge district court under 28 U.S.C. 2282 to hear petitioner's constitutional challenge to court-martial proceedings against him. Petitioner's complaint in the district court sought to enjoin the conduct of the court-martial on the ground

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that its proceedings, as well as the provisions of the Uniform Code of Military Justice under which he had been charged (10 U.S.C. 890, 933, 934), violated his First Amendment rights. On May 3, 1967, the district court held that it was without jurisdiction to grant a preliminary injunction or to convene a three-judge court (Pet. App. 37–43). On May 9, 1967, the court of appeals (Chief Judge Bazelon dissenting) denied petitioner's application for a stay and for a writ of mandamus (Pet. App. 46–69). A motion for rehearing was denied by the court of appeals on June 7, 1967. Petitioner's application to the Chief Justice for a stay pending the filing and disposition of a petition for certiorari was referred to the full Court and denied on May 22, 1967 (387 U.S. 915). On June 3, 1967, the court-martial that petitioner sought to enjoin entered its judgment convicting petitioner of three charges and dismissing two charges. Military review proceedings are now pending.

The three charges of which petitioner has been convicted may be set forth briefly. Charge I concerned petitioner's duties as an Army doctor assigned to the United States Army Hospital at Fort Jackson, South Carolina, as Chief of Dermatology. The charge alleged that petitioner refused to obey a lawful command from his superior officer to establish and operate a dermatology training program for Special Forces Aidmen, in violation of Article 90 of the Uniform Code of Military Justice, 10 U.S.C. 890 (willful disobedience of the lawful command of a superior commissioned officer). Charge II alleged that petitioner ut-

tered statements to enlisted men "with design to promote disloyalty and disaffection," in violation of Article 134, 10 U.S.C. 934 (disorders and neglects to the prejudice of good order and discipline).[1] A third charge referred to similar statements made by petitioner to enlisted men at Fort Jackson, in violation of Article 133, 10 U.S.C. 933 (conduct unbecoming an officer and a gentleman).[2]

In his complaint in the district court, petitioner sought to enjoin the court-martial from proceeding against him on these charges, and on two other charges which have since been dismissed.[3] With respect to the charge of willfully disobeying the order to establish

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[1] As set forth in the specification of Charge II, the statements in question would appear to advocate disobedience of orders: "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam, by being given all the hazardous duties and they are suffering a majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight."

[2] Included among the statements set forth in the specification to this charge were the following: "I will not train special forces personnel because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children'"; "I would refuse to go to Vietnam if ordered to do so"; "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey"; "I hope when you get to Vietnam something happens to you and you are injured."

[3] The two charges that have been dismissed related to a letter written by petitioner to a soldier in Vietnam. See Pet. 5–6.

a dermatology training program, petitioner alleged that, although the "stated basis" of the charge was willful disobedience of a lawful command, the charge was "in truth and in fact, based upon the opinions of plaintiff privately and informally expressed on political subjects and his failure to be granted a loyalty security clearance by the G-2 Section of the United States Army" (Complaint, para. 5). With respect to the other charges, petitioner alleged that Articles 133 and 134 of the Uniform Code of Military Justice are unconstitutionally vague and, as proposed to be applied by the court-martial, would violate his First Amendment rights.

The district court held that it had no jurisdiction to enjoin the court-martial proceedings. The court of appeals (Tamm and Leventhal, JJ.) agreed. Chief Judge Bazelon was of the view that a substantial constitutional question requiring the convening of the three-judge court was presented, and that a stay should be issued to preserve the jurisdiction of the court.

1. Petitioner urges that the court below erred in denying him a statutory three-judge tribunal before which to challenge *in limine* the court-martial proceedings against him. We submit on the contrary, that its disposition was correct and that the review of the conviction should go forward in the channels prescribed by Congress.

We begin with the proposition that the courts, for obvious reasons, have always been loath to interfere in the internal discipline of the armed forces. We know of no case in which an injunction against the

conduct of court-martial proceedings has issued. As Judge Leventhal observed below (Pet. App. 48–49), petitioner's prayer "runs into a judicial tradition which for more than 150 years has resisted all efforts to issue mandates intended to obviate exposure to court-martials or anticipate the results of proceedings before military tribunals." See *Wales* v. *Whitney*, 114 U.S. 564; *Gusik* v. *Schilder*, 340 U.S. 128; cf. *Orloff* v. *Willoughby*, 345 U.S. 83, 94. The reasons for such forebearance are illustrated by this case. The most serious charge of which petitioner has been convicted is willfull disobedience of the lawful command of a superior officer. To prevent duly constituted military tribunals from proceeding with their consideration of such a charge would inject civilian courts into the heart of military organization and discipline. There are also serious practical difficulties in summoning military personnel—quite possibly from distant posts and theaters of combat—to appear before civilian courts in order to pre-try military offenses and to appraise the motives of the officers who have pressed charges. Petitioner's attempt to circumvent the statutory procedures for the adjudication and review of military charges does not represent an appropriate invocation of federal equity jurisdiction.

Nor is there any apparent necessity for such an extraordinary judicial undertaking. Petitioner's conviction is now pending before a board of review authorized to reconsider the evidence and to affirm "only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact" (10 U.S.C. 866). From an adverse

determination by the board, petitioner may seek further review before the Court of Military Appeals. 10 U.S.C. 867. See also 10 U.S.C. 871, 874, 1552. Before those tribunals he is free to press his constitutional challenge; if they disagree with his constitutional claims, he may then seek redress in civilian courts. *Burns* v. *Wilson*, 346 U.S. 137.[4]

Petitioner places undue weight on *Dombrowski* v. *Pfister*, 380 U.S. 479. The issue there of course related to the power of the federal courts to enjoin State criminal proceedings. Language in the Court's opinion which might appear broad enough to apply to courts martial must be read in light of the Court's frequent admonition that general language in its opinions must be limited to the context in which uttered. Beyond that, we point out that the State prosecution enjoined in *Dombrowski* (and this against the background of a settled power to enjoin State criminal proceedings, *Ex parte Young*, 209 U.S. 123, which has no parallel in the military area) was based on criminal statutes that the Court found were unconstitutional and void on their face. No such charge has been, or could possibly be, leveled against Article 90 of the Uniform Code of Military Justice, which punishes disobedience of orders and under which the most serious charge against petitioner is

[4] Contrary to petitioner's suggestion (Pet. 27), his release from confinement would not prevent him from obtaining judicial review in an action for declaratory judgment or for back pay. *Gallagher* v. *Quinn*, 363 F. 2d 301 (C.A. D.C.); *Shapiro* v. *United States*, 69 F. Supp. 205 (Ct. Cl.); *Hooper* v. *United States*, 326 F. 2d 982 (Ct. Cl.).

laid. Moreover, the inevitably wide gulf between civilian and military life as regards the balance of freedom and discipline make *Dombrowski's* protective doctrine peculiarly inapposite in the present context. In sum, petitioner has failed to establish the twin requirements for convening a three-judge district court to consider a constitutional challenge: a substantial constitutional question and a basis for equitable relief. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715.

2. In addition, we believe that petitioner's prayer for injunctive and declaratory relief is, in its essential aspects, moot. The court-martial he sought to enjoin has been held. We do not read his complaint as embracing a prayer to enjoin the pending military review proceedings, which could result in the dismissal of one or more of the charges or in a reduction of sentence and which must be exhausted before he may seek review by habeas corpus. The case, as noted above, is before the board of review, which is prepared to proceed expeditiously.[5]

Petitioner suggests (Pet. 24, n. 3) that the case is not mooted by his conviction because he sues on behalf of all others similarly situated and seeks to enjoin all courts-martial "when the charges therein are alleged violations of Articles 133 or 134 * * * and, when such charges are politically motivated, under Article 90 of the Uniform Code of Military Justice" (Complaint,

[5] Petitioner recently obtained a substantial extension of time within which to make his submission before the board of review.

p. 21). It seems sufficient to say that the substantiality of the questions that might be raised by the members of this suppositious class cannot be assessed on this record.[6]

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

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[6] The examples cited in the petition (Pet. 23–24) of allegedly unconstitutional use of courts-martial illustrate the inappropriateness of the generalized injunction petitioner seeks. Thus it seems likely that a soldier who participates in a demonstration while off-duty and in civilian clothes has a more substantial claim to constitutional protection than a private who, while on duty, refuses to obey an order to open his foot locker or an officer who, like petitioner, makes statements to enlisted personnel under his command calculated to promote disobedience.

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